No. 151

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

v.

GREAT NORTHERN RAILWAY COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the district court for the District of Minnesota, Fourth Division (R. 592), is reported in 96 F. Supp. 298. The report of the Interstate Commerce Commission (R. 11) appears in 275 I. C. C. 512.

JURISDICTION

The final decree of the three-judge district court was entered on March 27, 1951 (R. 604). The petition for appeal was presented and al-

lowed on May 23, 1951 (R. 609–610). The jurisdiction of this Court is conferred by 28 U. S. C. 1253, 2101 (b), and 2325. Probable jurisdiction was noted on October 8, 1951 (R. 622).

QUESTIONS PRESENTED

The Montana Western Railway Company is a short-line railroad, approximately 20 miles in length, located in Pondera County, Montana. It acts as a feeder of the Great Northern Railway Company, a trunk line extending from the Pacific Coast to the Great Lakes region. Roughly 90 percent of the traffic carried by Montana Western consists of grain raised in the immediate area served by the line. Virtually all traffic is interchanged with Great Northern and carried by it in interstate commerce. There is no alternate rail route between stations on the Montana Western and points on the Great Northern.

Acting under authority of Section 15 (3) of the Interstate Commerce Act, the Interstate Commerce Commission, finding it to be in the public interest, ordered the establishment of a joint rate for the interstate carriage of grain, in carloads, over the lines of the two roads. It also prescribed, pursuant to Section 15 (6), the terms upon which the joint rate was to be divided.

The joint rate ordered by the Commission was fixed at the same level as the pre-existing com-

bination rate on grain.[1] However, the division prescribed has the effect of giving Montana Western an increased share of the revenue. In making its order, the Commission gave weight to the fact that Montana Western needed added revenue if it was to continue in operation. The court below set aside the Commission's order, insofar as it relates to the establishment of joint rates and divisions thereof.[2] The following questions are presented:

(1) Whether the Commission was authorized, in prescribing the joint rate and the division, to consider and give weight to the financial needs of the participating carriers;

(2) Whether the order of the Commission was arbitrary and capricious.

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[1] A combination rate is the sum of the separately established rates of two or more carriers which hold themselves out to provide through carriage over their connecting facilities. *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 460; *Matter of Through Routes and Through Rates*, 12 I. C. C. 163. A joint rate, like a combination rate, is a rate for carriage over two or more lines which provide through service. It is a rate, however, which is established by agreement between the participating carriers (Interstate Commerce Act, Section 1 (4)), or, in certain cases, by direction of the Commission (Section 15 (1), (3), (4)). The division of a joint rate is determined by the terms of the agreement (see Section 1 (4)) or by Commission order (Section 15 (6)). See, generally, *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 139 (footnote).

[2] Other aspects of the Commission's order are not involved in this appeal.

STATUTE INVOLVED

Section 15 of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U. S. C. 15, provides in part:

> (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall

be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet

its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

* * * * *

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent

to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

STATEMENT

Nature of the administrative proceedings

On March 29, 1949, Montana Western applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing the abandonment of its line of railway (R. 49). Hearings on this application (I. C. C. Finance Docket 16515) were held at Valier, Mon-

tana, in July 1949 (R. 71–403). The following parties appeared as protestants: The State of Montana; the Montana State Board of Railroad Commissioners; the Board of County Commissioners of Pondera County, Montana; Ralph C. Bricker of Great Falls, Montana, appearing for himself and for Senator Zales N. Ecton and Congressman Wesley A. D'Ewart, both of Montana; the Pondera County Canal & Reservoir Company, Conrad, Montana; the Utah-Idaho Sugar Company, Salt Lake City, Utah; the Brotherhood of Railroad Trainmen; and the Valier Community Club of Valier, Montana, a voluntary organization composed of local citizens and shippers (R. 71).

On August 1, 1949, before final action had been taken on the application for abandonment, the Valier Community Club filed a complaint with the Commission against Montana Western and Great Northern. It asked that the Commission establish reasonable joint rates on grain moving in carloads from points on the Montana Western to points on the Great Northern, and that it prescribe just, reasonable and equitable divisions of such rates. (R. 403–8.) By order of October 13, 1949, the proceeding initiated by the Valier Community Club (I. C. C. No. 30325) was consolidated with the abandonment application (R. 11). The order contained a proviso that witnesses who previously testified at the abandonment hearing should be made available for cross-examination

by Great Northern (R. 12). Further hearings were held at Great Falls, Montana, in December 1949 (R. 426–567).

After the filing of the examiner's proposed report and exceptions thereto, the Commission, on July 31, 1950, handed down its report and order, denying the application for abandonment, directing the establishment of joint rates on grain, and prescribing a formula for the division of those rates (R. 11–25).

The Montana Western Railroad

The Montana Western extends from Valier, Montana, to Conrad, Montana, a distance of approximately 20 miles (R. 596; Ex. 40). Conrad is a station on Great Northern's lines and is the point at which freight is interchanged between the small feeder line and the trunk line (R. 596). There are two intermediate stations on the Montana Western—Manson and Williams—located 7 and 14 miles, respectively, from Conrad (R. 12).

Montana Western was incorporated under the laws of Montana in 1909, and its track was laid the same year (R. 12).[3] This was the period in which the Valier area was settled, and, initially, the railroad was used to bring in building and construction materials, supplies, and settlers

[3] The tracks were placed directly on the sod and the roadbed's drainage is accordingly poor, a condition which results in the rapid deterioration of crossties and increases maintenance costs (R. 14).

and their belongings (R. 436).[4] Since the period of early settlement, the line's main function has been the outbound carriage of agricultural produce (principally wheat) raised in the area (R. 16, 436).

Montana Western's original capital was provided by a local land irrigation company (now known as the Valier Company) and by Great Northern (R. 13). The Valier Company subscribed to stock to the extent of $150,000 and Great Northern purchased a $165,000 bond issue secured by a first mortgage (R. 13, 78, 95–6). The bonds bear interest at the rate of six percent and have matured (R. 13). Montana Western, however, has not paid any of the interest or principal (R. 13).

Over the years, Montana Western's operations have been unprofitable. For the period 1933–1948, the average annual deficit has been approximately $18,000 (R. 122; Ex. 11). The recurring losses have been met with periodic advances furnished by Great Northern. In the aggregate, these advances amount to $195,829 (R. 13). Montana Western's total indebtedness to Great Northern, including the bonded indebtedness and unpaid interest, is $737,604 (R. 13).

[4] The desirability of locating in the area was widely advertised through literature published and disseminated by Great Northern. This literature stressed the fertility of the land and the availability of irrigation and railroad service (R. 13, 347, 358).

Figures for the first nine months of 1949 showed that the railroad's operating revenues had reached a new high (Exs. 11, 30). But while these revenues were sufficient to cover current operating costs, they were still not sufficient to meet fixed charges falling due (Ex. 30). Moreover, Montana Western's general manager, testifying in support of the application for abandonment, estimated that future operations, at existing rates, would continue to show net losses (R. 133, 515–517; Ex. 37). It was his view that increased revenues of about $33,000 per annum would be needed, under normal conditions, to maintain and improve the line and to put it on a permanently sound financial basis (R. 516–517; Ex. 37).[5]

On numerous occasions Montana Western has requested Great Northern to exercise its rights under the mortgage, to take over the feeder line and operate it as a branch (R. 15, 199–206). Great Northern always refused to take this step (*ibid.*). It had indicated, however, a general willingness "to see that the Montana Western is taken care of to the extent that it is unable to take care of itself" (R. 15). This was reflected by Great Northern's undertaking, in 1947, to underwrite a rehabilitation program designed to improve the Montana Western and put it on a more economical operating basis (R. 15, 226–9). In

[5] He also estimated that extraordinary rehabilitation expenditures would be called for in 1950, and for that year he put the desired increment at $57,440 (R. 515–517; Ex. 37).

1948, Great Northern actually advanced some $17,000 worth of materials in conjunction with this program (R. 228). But on March 1, 1949, it announced that it would make no further advances of any kind to Montana Western (R. 15).[6] This precipitated the application for abandonment filed later the same month (R. 210–214).

Normally, about 90 percent of Montana Western's revenue is derived from the outbound carriage of carloads of grain (Ex. 43).[7] All of the grain cars are interchanged at Conrad and carried from that point by Great Northern, most of them going to the grain terminals located at Minneapolis and Duluth, Minnesota (R. 17, 143; Ex. 44).[8] The rates on grain hauled over the lines of the two carriers are combination rates (the joint rates prescribed by the Commission have never gone into effect), i. e., they are the sum of Montana Western's proportional rate to Conrad and Great Northern's proportional rate from Conrad to the ultimate destination (R. 19).[9] Montana

[6] The discussions and correspondence between Montana Western's counsel and the Great Northern which preceded this announcement are set forth at R. 197–214, and summarized at R. 15.

[7] For a breakdown of the freight traffic by commodities, see Exs. 41 (outbound) and 42 (inbound). Passenger traffic on the road is negligible and has no practical economic significance (R. 18).

[8] Some of the grain goes to other eastern terminals, and a portion of it is carried to Pacific Coast terminals (R. 17).

[9] A combination rate (see note 1, *supra*) may consist of either "locals" or "proportionals." *Western P. R. Co.* v.

Western's proportional rate from Valier to Conrad is 9 cents per cwt. (R. 19). Great Northern's proportional rate from Conrad to Minneapolis (1,030 miles) is 62.5 cents,[10] making a combination rate on Valier-Minneapolis grain traffic of 71.5 cents[11] (R. 19).

Montana Western's general manager testified that the only way in which the railroad could be put on a paying basis would be to increase Montana Western's revenue from grain (R. 130–4). But it was his opinion that raising Montana Western's proportional rate on the traffic would probably result in a loss of volume (R. 133);

Northwestern P. R. Co., 191 I. C. C. 127, 130. A local rate is the rate charged by a single carrier on traffic moving between two points on its own track. A proportional rate is a rate that one carrier charges for its share of a run which extends beyond its own lines; it is characteristically lower than the rate on local traffic moving over the same portion of that carrier's track.

Joint rates (see note 1, *supra*) are already in effect between points on the Montana Western and points on the Great Northern on numerous commodities. However, these commodities account for only about 5 percent of Montana Western's carload tonnage. (R. 19.) The Montana Western's division on this traffic is generally 12½% (R. 145).

[10] Great Northern's local rate from Conrad to Minneapolis is 65.5 cents, i. e., 3 cents more than the proportional rate (R. 19).

[11] Great Northern's rates to Duluth, Minnesota, Superior, Wisconsin, Sioux City, Iowa, and all stations in North and South Dakota are the same as its rates to Minneapolis (R. 19, 535; Exs. 44, 45). Its proportional rate to Spokane, Washington (475 miles), is 56 cents, and to Seattle, Washington (788 miles), 58.5 cents (*ibid.*).

And he declared that, so far as he knew, Montana Western had never considered proposing the establishment of a joint rate and a division of that rate which would increase its earnings (R. 188).[12]

The Montana Western's rolling stock presently consists of two locomotives and one flat car (R. 14). It hires freight cars from the Great Northern on a per diem basis (R. 19). A mixed train makes a round trip daily, except Sundays, and carries the mail (R. 13). The operations normally require thirteen full-time employees (R. 14).

The public interest affected

The area served by the Montana Western is about 553 square miles and has a population of approximately 2,000 persons, 800 of whom live in Valier proper (R. 12). While the population has remained fairly constant in recent years, the amount of land under cultivation is still increasing (R. 87, 342). The section is one of the best farming and grain-raising areas in the State (R. 268, 340, 344, 463, 490), producing as much as one million bushels of wheat annually (R. 185), in addition to other produce (Ex. 41). It is also one of the most progressive and prosperous rural areas in Montana (R. 265–8, 437).

Wheat is the mainstay of the economy, although the land is also highly suitable for general farm-

[12] Other testimony in the record indicates that Great Northern played an important, if not dominant, role in the establishment of Montana Western's rates and practices (R. 155–6, 175, 247).

ing (R. 16, 344).[13] The wheat farmers are directly dependent upon the facilities of the Montana Western and the six large grain elevators, representing an investment of several hundred thousand dollars (R. 270, 330, 339, 343),[14] which are located directly on the rail line (R. 18, 185).[15] Storage space on the farm is necessarily limited and the farmers require an assured and accessible outlet for their produce (R. 252–3, 299, 356, 386, 463). During the harvesting season, they characteristically move the grain directly from combine to town as it accumulates (R. 252, 386). The average distance from the farm to points on the Montana Western is 7.5 miles (R. 16.) In the event the line were abandoned, the average distance to the nearest railhead would be about 25 miles (R. 16).

[13] In the past sugar beets, for example, have frequently figured as an important cash crop (R. 234, 246), and one which, incidentally, contributes to the soil's fertility (R. 244, 443). The growth of beets declined sharply during the war years because the large labor force required to raise them was not available (R. 234); it is now on the increase (R. 234–7, 246, 443). But farmers cannot profitably raise sugar beets unless they have rail service close at hand (R. 299, 443). Officials of the factory which purchases the Valier beet crop testified that continued beet cultivation in the area required the continued operation of the Montana Western (R. 242, 246).

[14] The value of the two large elevators owned by Cargill, Inc. (R. 18), does not appear of record.

[15] Four of the grain elevators are located at Valier and two at Williams (R. 18). A seventh elevator, located at Manson, is used exclusively for handling mustard seed (R. 18).

The burden of increased cost and time consumed in hauling greater distances would fall directly upon the farmer (R. 261, 328, 349, 364, 386, 479).[16] It appears, moreover, that grain elevator space is at a premium and that the elevators located at Conrad (seven in number) are already inadequate to handle the load which comes from the farms in that immediate vicinity (R. 276, 337, 364).[17] Since Conrad-area grain is harvested earlier than Valier-area grain (R. 364), Valier farmers would have no available outlet in the event of the disappearance of the grain elevator-rail system which they presently use (R. 276, 337, 364). All of the farmers and grain dealers who testified on the subject were agreed that long distance truck hauling to eastern grain terminals like Minneapolis would be prohibitive in cost and

[16] The grain elevators at Valier ordinarily pay the same price as is paid at Conrad, Shelby, and other stations in the region (R. 261).

Most of the grain-elevator owners were agreed that they probably could not continue to operate in the Valier area if the Montana Western were abandoned (R. 18). An official of the International Grain Elevator Co., which has two elevators in Williams, testified that he knew of no grain elevator which was not located beside a rail line (R. 484). One of the elevator companies operating in Valier, which also owns facilities in Conrad, indicated that it would stay open and employ trucks to haul between Valier and Conrad (R. 18, 271). This, of course, would be a far less economical arrangement than all-rail service (R. 331, 337).

[17] The same situation prevails at other stations on the Great Northern within possible reach of the Valier farms (R. 271, 337, 349, 364, 386).

entirely out of the question (see, *e. g.*, R. 271–2, 331, 339, 348, 361, 484).

The Secretary-Counsel of the Montana Board of Railroad Commissioners compared Montana Western's traffic to that generated by three comparable feeder lines located in the general vicinity: the Pendroy branch of the Great Northern; the Augusta branch of the Great Northern; and the Agawam branch of the Chicago, Milwaukee & St. Paul (R. 369–373). His testimony showed that the Montana Western produces substantially more revenue traffic per mile of road than any of the other three feeder lines (R. 20, 369–373).

It was also testified that the existing public roads between Valier and Conrad (23 road miles) could not support truck tonnage in the amounts that would be necessary in the event that the rail line were abandoned (R. 297–8, 304–5).[18] There are no existing common carrier motor trucks serving Valier, Manson, or Williams (R. 15).

The general manager of Montana Western testified that he regarded the railroad's operation as a matter of public convenience, but not as one of public necessity (R. 165, 177). All of the farmers, grain dealers, and other businessmen of the community who testified—more than twenty in number—were unanimously of the opinion that the railroad is an integral part of the area's

[18] One witness testified that if the traffic which moves over the railroad were hauled to Conrad in trucks, the roads would be worn out before the first crop was delivered (R. 298).

economy and vitally necessary to its continued well-being (see, *e.g.*, 242, 248, 252, 261, 269, 272, 279, 295, 299, 301, 307, 311, 328, 331, 339, 345, 348, 355, 359, 363, 367, 368, 369, 386, 463, 479, 482, 483, 484, 486, 494). This view is shared by the various protestants listed above (p. 8, *supra*) and by the Governor of Montana (R. 357–8, 433).

Decision of the Commission

Reviewing the evidence concerning Montana Western's operations and their importance to the community served, the Interstate Commerce Commission concluded "that public convenience and necessity do not permit the abandonment of the line" (R. 23–4). It further found "that it is necessary and desirable in the public interest that joint through rates be established for the interstate transportation of grain, in carloads, from points on the Montana Western to points on the Great Northern, and that such rates may not exceed the present combination of proportional rates to and from Conrad" (R. 24).

The Commission prescribed a division formula [19]

[19] As a yardstick for expressing the formula the Commission used the so-called appendix-10 scale of first-class rates published in the *Class Rate Investigation, 1939*, 262 I. C. C. 447, 766. It stated:

"We are of the opinion that the appendix-10 scale * * * increased 20 percent for the hauls over the Montana Western, are appropriate factors for the division of joint rates on grain from Montana Western origins to Great Northern destinations, except that in the division of rates to Minneapolis and Duluth, factors for the Great Northern 10 percent below the scale are warranted because in many instances it receives

which, it was estimated, would yield Montana Western a revenue increase of approximately $58,000 a year (R. 22–23).[20] It held that this increase was "needed to insure safe and efficient operation of that carrier's line and to pay interest on its indebtedness to the Great Northern" (R. 23).[21] It also held that a consideration of the revenue needs of Montana Western justifies "the prescription of relatively higher divisional factors for the Montana Western than for the Great Northern" (R. 21).

The Commission also found that Great Northern's grain rates from Conrad were high compared to its charges on similar runs. It made particular reference to grain traffic originating at Pendroy and Augusta, Montana, stations located on branch lines of the Great Northern and in the same general vicinity as Conrad, though somewhat further from Minneapolis (R. 20–21). It found that Great Northern's *local* rates on Pendroy-Minneapolis and Augusta-Minneapolis traffic are substantially the same as its *proportional* rate

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additional revenue on the traffic beyond those two points" (R. 22).

Application of this formula to Valier-Minneapolis grain traffic (total rate, 71.5 cents per cwt.) results in an increase in Montana Western's share from 9 cents to 16.3 cents (R. 23).

[20] The district court has found that the increase would be "an annual amount of at least $35,000" (R. 602).

[21] The Commission found that there was no existing "inefficiency of operation, except such as may have resulted from the inability of the Montana Western to obtain sufficient revenue" (R. 21).

from Conrad to Minneapolis (R. 20–21). It concluded that the divisions prescribed in the instant case would give Great Northern a car-mile yield on Conrad-Minneapolis traffic originating on the Montana Western which would be in substantial conformity with its car-mile earnings on Pendroy-Minneapolis and Augusta-Minneapolis traffic, "considering the proportional nature of this traffic from Conrad" (R. 23).[22]

Decision of the district court

The district court pointed out that the Commission did not find the "existing combinations of proportional rates on grain * * * to be unlawful" (R. 602). It concluded (*ibid.*) that "joint through rates in the same amounts as said existing lawful combinations" were prescribed "solely as a foundation for fixing divisions which will allow Montana Western a substantially increased proportion of the through revenue." The court's opinion declares (R. 594):

> Resolving every presumption in favor and support of the order of the Commission, we cannot avoid concluding that prescribing joint through rates on the same level as existing lawful combinations, but with divisions which are unduly favorable to the Montana Western and clearly unfair to the Great Northern, is but a means to the

[22] On such proportional traffic Great Northern, of course, avoids the expenses incident to origination of freight.

end of assisting Montana Western to meet obvious financial needs. This is expressly prohibited by law.[23]

Holding that the order was contrary to law and not sustained by the evidence, the court decreed that it be set aside (R. 594).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

(1) In holding that the order of the Commission violates the prohibitions of Section 15 (4) of the Interstate Commerce Act and is contrary to law;

(2) In holding that the record affords no basis for the division of the joint rate prescribed by the Commission.

SUMMARY OF ARGUMENT

Congress has imposed upon the Interstate Commerce Commission the affirmative duty of developing and maintaining an adequate public system of transportation. To this end, it has conferred upon the Commission the power to prescribe joint rates and the divisions of these rates (Section 15 (3)). It has directed, moreover, that in fixing divisions the Commission

[23] For this proposition the court cites the following prohibition in Section 15 (4):

"No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

shall consider, *inter alia*, the financial needs of the participating carriers (Section 15 (6)). This Court has repeatedly upheld the authority of the Commission to give a weak road a portion of a joint rate larger than its *pro rata* share of the total service performed, in order to maintain it in effective operation. *New England Divisions Case,* 216 U. S. 184. The constitutional limitation upon the Commission's power, that the share left the strong road must be adequate to avoid a confiscatory result, is satisfied here. Appellee has made no claim to the contrary.

Congress has also conferred upon the Commission the power to open up new routes and to establish joint rates for such routes (Section 15 (3)). This power, however, is subject to a statutory limitation. The Commission is prohibited from diverting traffic to a new route where the effect will be to short-haul [24] one of the carriers directed to participate therein, unless certain specified considerations of policy require the diversion (Section 15 (4)). The Commission is also expressly forbidden from diverting traffic from one route to another, merely to confer a financial benefit upon a particular carrier (*ibid.*).

The instant case does not involve the diversion of traffic from one route to another. It involves the establishment of a joint rate and divisions for

[24] To short-haul a carrier is to require it to contribute to a route substantially less than the entire length of its railroad between the termini of such route.

traffic moving over the only route that is physically available, a route that will disappear unless steps are taken to maintain it. The district court nonetheless relied upon the prohibitory language contained in the short-haul provision (Section 15 (4)), holding that the prescription of the joint rate and the division was predicated upon the Montana Western's financial needs and that this was contrary to law. It is plain from the statutory scheme and from the legislative history of Section 15 (4) that the language upon which the court rested its decision is applicable only to cases involving the diversion of traffic to a new route and, as an incident thereof, short-hauling.

The district court, believing that it was necessary to exclude from consideration the evidence going to the financial needs of the carriers, concluded that the order was not sustained by the evidence. This conclusion is a direct consequence of the court's misconstruction of the statute. If the evidence of financial needs, together with the other pertinent evidence, is taken into account, it is clear that the order has an entirely rational basis in the record.

If Section 15 (4) is construed to deprive the Commission of power to assist weak carriers which are already participating in through routes with other carriers, many railroads, particularly short lines like the Montana Western, may be

forced to the wall. Such a result would do violence to the provisions of Sections 15 (3) and (6) and to the basic National Transportation Policy in the light of which those sections are to be applied.

ARGUMENT

I

IN PRESCRIBING THE JOINT RATE AND THE DIVISION THEREOF, THE COMMISSION WAS AUTHORIZED TO CONSIDER THE FINANCIAL NEEDS OF THE PARTICIPATING CARRIERS

The Commission established a joint rate on grain and a division of that rate favorable to the Montana Western. This action was based largely upon findings that the Montana Western needed increased revenues in order to keep running and that the continued operation of the line was in the public interest.[25] The Commission

[25] Great Northern's petition to set aside the Commission's order (R. 1) did not controvert either of these findings. It is, in any event, clear that the findings are abundantly supported by the record. See Statement, *supra*, pp. 10–18.

Great Northern points to the absence of a finding that the existing combination rate was unlawful (Motion to Affirm, p. 20). However, the power to prescribe a joint rate does not depend upon such a finding. It is sufficient if the establishment of a joint rate is "in the public interest." Section 15 (3); *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 142 ("No reason appears why the regulation might not take the form of compelling the substitution of a joint rate for a

expressly declared that Montana Western's financial needs were a "justification for the prescription of relatively higher divisional factors for the Montana Western than for the Great Northern" (R. 21).

The district court correctly held that the Commission's order was "a means to the end of assisting Montana Western to meet obvious financial needs" (R. 594). It then declared—in our view, erroneously—that "This is expressly prohibited by law" (*ibid.*).

We believe that the only real issue in the case is the extent of the Commission's statutory powers under Section 15 of the Interstate Commerce Act. This issue turns on the construction of the three paragraphs of the Section fully set forth above (pp. 4–7).

Paragraph (3), which relates both to the establishment of through routes and the prescription of joint rates, declares in part:

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through rate made by a combination of local rates * * *"). Appellee also cites *Beaumont, Sour Lake and Western Ry. Co.* v. *United States*, 282 U. S. 74, 82, for the proposition that "The Commission may not change an existing division unless it finds that division unjust or unreasonable" (*ibid.*). It is obvious, however, that the Commission could not have found "existing divisions" unreasonable when there were no divisions in effect. The Commission made the only finding that it could: that the divisions prescribed were "just, reasonable, and equitable" (R. 24). It reached that result upon an application of the specific statutory criteria set forth in Section 15 (6).

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon a complaint or upon its own initiative without complaint, establish through routes, joint classifications, and *joint rates,* fares, or charges * * * *and the divisions of such rates,* fares, or charges as hereinafter provided * * * [Italics supplied.]

Paragraph (6) elaborates the criteria that the Commission is to consider in fixing divisions of joint rates. It states in part:

> In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, *the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property* held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge. [Italics supplied.]

Paragraph (4) is known as the short-haul provision (see, generally, *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, 590–3). It limits the power of the Commission to divert traffic to a new route where that would have the effect of compelling one of the participating carriers "to embrace in such route substantially less than the entire length of its railroad * * * between the termini of such proposed through route." The entire thrust of this provision is that a carrier can only be compelled to short-haul itself (i. e., to suffer a loss in the amount of its trackage incorporated in a route, as a result of the interjection of another carrier) in certain stated circumstances. As more fully indicated below, we believe that it has no application to the problem posed by the present case, and that the district court, which rested its decision on language appearing in that paragraph (see note 23, *supra*), misconstrued its effect and purpose.[26]

The Commission's general authority to establish "joint rates * * * and the divisions of such rates" is set forth in unmistakable terms in the statute (para. (3)). The Commission may take such action "whenever deemed by it to be necessary or desirable in the public interest,"

[26] Short-hauling, of course, is not involved in the instant case. That problem can only arise where there are alternate rail routes.

either "upon complaint or upon its own initiative without complaint" (*ibid.*).[27] In prescribing divi-

[27] Great Northern contended, in its petition to set aside the Commission's order, that there should have been two separate proceedings in conjunction with the complaint of the Valier Community Club, one to determine the propriety of establishing a joint rate, and a second, contingent upon the outcome of the first, to determine the basis of division (R. 7). This contention was not accepted by the district court, and we believe it entirely without merit. There is certainly nothing in Section 15 requiring or suggesting that the Commission must conduct one proceeding to establish a joint rate and another to divide it between the participating carriers. Indeed, the Commission is directed to "conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice" (Interstate Commerce Act, Section 17 (3), 49 U. S. C. 17 (3)). In the instant case it would have been an idle act to prescribe a joint rate on grain, unless the Commission was prepared, at the same time, to give Montana Western a share of that rate sufficient to keep the road in operation. The Commission is not to be condemned because "it chose to write one report rather than two, especially in matters as closely related as these * * *." *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 523. Indeed, this Court has recognized the Commission's power to prescribe a joint rate and a division in the same order. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 480; *O'Keefe* v. *United States*, 240 U. S. 294, 300-2.

Great Northern also objected that the Commission considered the complaint of the Valier Community Club on a common record with Montana Western's application for abandonment (R. 7). This objection, which was also ignored by the district court, is equally lacking in substance. Plainly, approval or disapproval of the application for abandonment depended in large measure upon whether there was any practical alternative. The feasibility of Valier's proposal was, therefore, an intimately related matter. Moreover, that proposal involved numerous questions of fact identical with those raised by the application for abandonment, *e. g.*, the

sions, the Commission is enjoined to consider, *inter alia,* the financial needs of the participating carriers (para. (6)).

Decisions of this Court have repeatedly upheld the Commission's authority to consider the financial needs of a weak road and to give it a portion of a joint rate larger than the share to which it would otherwise be entitled, in order to maintain it in effective operation as part of an adequate public transportation system. *New England Divisions Case,* 261 U. S. 184, 189–195; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 477; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 284–5; *Beaumont, Sour Lake & Western Ry. Co.* v. *United States,* 282 U. S. 74, 87; *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 360–1; cf. *Interstate Commerce Commission* v. *Hoboken R. Co.,* 320 U. S. 368, 381.[28] The purpose and the constitutionality of the statute were fully explored in the *New England* case, which involved a Commission order granting weak car-

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extent of the railroad's financial needs. To determine the Montana Western application and the Valier proposal on a common record was an expeditious and eminently sensible course. Since Great Northern was given full opportunity to examine all witnesses called at the prior abandonment hearing and to put in all of its proof, it has no cause for complaint. *New England Divisions Case,* 261 U. S. 184, 200.

[28] See, also, the Commission's decisions in *Southwestern—Official Divisions,* 234 I. C. C. 135; *Divisions of Rates, Official and Southern Territories,* 234 I. C. C. 175; *Official Western Trunk Line Divisions,* 269 I. C. C. 765; and *Divisions of Rates, Official and Southern Territories,* 278 I. C. C. 89.

riers east of the Hudson an increased share of existing joint class rates on traffic moving to and from the west. The Court held (pp. 189–191) that Congress' objective had been to enable the Commission to divide joint rates in the public interest, assisting weak carriers, where necessary, to the end that the whole transportation system might be maintained.[29] The Court further held (p. 195) that the "apportionment of a joint rate

[29] As Justice Brandeis observed, prior to 1920 "the effort of Congress had been directed mainly to the prevention of abuses; particularly those arising from excessive or discriminatory rates" (p. 189). The Transportation Act of 1920 (41 Stat. 456) introduced a new railroad policy, one which imposed upon the Commission the affirmative duty of creating and preserving an adequate public system of transportation. To that end the Commission was granted a wide range of new powers, including the power to prescribe the divisions of joint rates (pp. 189–190).

This underlying policy was reaffirmed in the Transportation Act of 1940 (54 Stat. 899), which declared that it was the National Transportation Policy

"to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

on the basis of the greater needs of particular carriers" presents no constitutional question in the absence of a claim that the division results in a confiscatory rate to the less-favored carrier. Great Northern has never claimed that the share left to it under the divisions prescribed by the Commission will be noncompensatory. Obviously, it could make no claim of confiscation at this stage. *New York* v. *United States*, 331 U. S. 284, 335–6.

On the basis of the above holdings it appears plain that the Commission was authorized to consider the financial needs of Montana Western. But the district court, relying on Section 15 (4), reached a contrary conclusion. The court rested specifically on the sentence in the proviso clause (see pp. 5–6, *supra*), which states that "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

Section 15 (4), as its text discloses, relates to the short-haul problem and to nothing else. It places certain limitations upon the Commission's power to establish new through routes for the movement of traffic. Let us suppose, for example, that there are a dozen physically available rail routes over which freight could be routed between Washington and Chicago. Let us suppose, further, that several of these routes are closed, either because certain railroads fail to provide

adequate through service, or because the rates for the movement of traffic over these routes are higher than the rates for other routes and hence constitute a commercial barrier.[30] Under Section 15 (3), the Commission would appear to have absolute authority to remove the obstacle by prescribing the through route and a joint rate applicable thereto. But Section 15 (4) qualifies this power. If the effect of opening the proposed new route will be to short-haul one of the carriers directed to participate therein, the Commission can act only under certain conditions.

Prior to 1940, when Section 15 (4) was last amended, the Commission could deprive a carrier of its long haul only if the existing route was "unreasonably long" or if there was an emergency justifying a temporary diversion.[31] For many years, the Commission contended that this

[30] An example of this not uncommon situation is provided by *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 666.

[31] Prior to the 1940 amendment, the Section read as follows:

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative with-

provision was unduly restrictive and it urged the Congress to grant it increased power to divert traffic to new routes. See the discussion of the statutory history of Section 15 (4) appearing in *Pennsylvania R. Co.* v. *United States*, 54 F. Supp. 381, 385–8 (D. Md.), cited with approval in the affirming opinion of this Court, 323 U. S. 588, 591–3. Indeed, the Commission urged that it be permitted to short-haul a carrier whenever it found such action to be in the public interest. *Ibid;* testimony of Commissioner Eastman before a Subcommittee of the Committee on Interstate Commerce, United States Senate, 76th Cong., 1st Sess., on S. 1085, pp. 3–4. Congress did not go that far.[32] However, Section 15 (4)

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out complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest." Transportation Act of 1920, 41 Stat. 456, 485–6.

[32] The Senate Subcommittee inquired of Commissioner Eastman if he would object to an attempt to define the elements which the Commission should consider in determining the public interest. As indicated by the following colloquy, Commissioner Eastman indicated that there was no objection:

"Senator REED. Yes; now, Mr. Eastman, may I ask you this question, because I am trying to get at the broadest possible scope of this thing, looking at the railroad situation as a whole and not with respect to any individual line: Would you think it would be pertinent or advisable to add a further proviso, that the Commission should not approve any route, even one published by the carriers, that was not reasonably efficient and economical?

as amended in 1940, authorized the Commission to short-haul a carrier (a) if the existing route was unreasonably long *or* (b) if the proposed new route was needed in order "to provide adequate, and more efficient or more economic transportation." The Section continues:

> *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which origi-

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"Commissioner EASTMAN. I personally would not have any objection to that.

* * * * *

"Senator REED. Mr. Eastman, just following out that thought I had, and which has been expressed in the record: Could you formulate a further provision that we could add to this proposed change in this paragraph, that would be of any help to the Commission in determining the public interest in these questions, and that would administratively be of any aid to you?

"Commissioner EASTMAN. Well, it could be done. You, yourself, suggested certain language which seems to me to be apt.

"Senator REED. Well, I regard you as a master of the subject. I wonder if you would be willing, upon request of the committee—to beg the pardon of the chairman—I am just trying to see if we could get a suggestion from Mr. Eastman along the lines that we are discussing, that might be helpful in the public interest; that is all.

"Commissioner EASTMAN. Well, any amendment of this bill would simply have the effect of defining the public interest with respect to the ordering of through routes by the Commission.

"Senator REED. That is right." [Hearings on S. 1085, *supra*, pp. 13, 21.]

> nates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. . . .

The district court construed the last-quoted sentence as applicable to the present case. While the sentence, standing alone, might conceivably be deemed applicable to the prescription of joint rates generally, to apply it to cases not involving short-hauling is to ignore both the legislative history and the statutory context.

Prior to 1940 there was no language in Section 15 (4) susceptible of application to a situation other than one involving short-hauling. See note 31, *supra*. A reading of the extensive hearings which led to the 1940 amendment shows that the testimony was focused exclusively upon the short-hauling problem.[33] It is plain that the 1940 amendment aimed only at a redefinition of the circumstances in which the Commission could compel a carrier to short-haul itself. There is no suggestion whatever in the legislative history

[33] See Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 3400; Hearings Before a Subcommittee of the Committee on Interstate Commerce, United States Senate, 76th Cong., 1st Sess., on S. 1085. A succinct statement of the problem that was under consideration is to be found in the testimony of Commissioner Eastman appearing in the Hearings on H. R. 3400 at pp. 211–213.

that Congress intended the amended section to apply to other matters.[34]

[34] The main opposition to the amendment to Section 15 (4) came from the trunk lines, which expressed grave concern for the preservation of their long hauls. Yet, none of the trunk line representatives suggested that there should be any limitation upon the Commission's power to prescribe joint rates and divisions for connecting lines carrying traffic over through routes already established and commercially open. Thus, Mr. Harry Wilson, testifying on behalf of 17 eastern trunk lines, stated (Hearings on H. R. 3400, *supra*, pp. 149–150):

"Now, *in making those divisions on local traffic to and from points on short-line railroads, consideration is given to all of the questions involving the necessities of the short-line railroads for revenue.*

"*Now, the short lines having accomplished that, are coming here and asking you to sanction by law that which will permit them to take from the through lines some additional money by injecting them into through routes*, and in every case where that is done—in most cases where that is done, at least—it will increase the cost of operation and reduce the net income to the railroads.

"What I have said about the use of short lines as intermediate routes applies also to trunk lines; that is, the larger railroads voluntarily short haul themselves in many cases where a joint route formed of two or more trunk lines affords economical operation, but this is quite different than being compelled by an administrative body to establish such routes regardless of their uneconomic character.

* * * * *

"The short-route provision of the Interstate Commerce Act, as now interpreted by the Court, is essentially sound from the standpoint of equity and economy. It has stood the test of time and even now there is no clear argument as to actual reasons why there should be any change." [Italics supplied.]

The testimony of Mr. Joseph Eshelman, assistant general counsel of the Pennsylvania Railroad Company, is to the same effect (*id.*, p. 177).

Great Northern in its Motion to Affirm (p. 16), relied upon the following statement appearing in the Conference Report on the bill (H. Conference Report No. 2832, 76th Cong., 3rd Sess., pp. 70–71):

> The House amendment made no change in the short-haul provisions of section 15 (4) and the exceptions thereto. The conference substitute in section 10 (b) retains them and includes another exception by providing that the restriction against short-hauling a rail carrier shall not apply where the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation. The Commission in the exercise of this additional authority is directed to give reasonable preference in any particular case to the carrier by railroad which originates the traffic, so far as is consistent with the public interest and subject to the limitations with respect to unreasonably long routes and the necessity of providing adequate and more efficient or more economic transportation. The Commission is prohibited from establishing any through route and joint rates applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs.

In our view, this statement serves to confirm appellants' position. The references to "change[s] in the short-haul provisions" and to the circum-

stances when "the restriction against short-hauling a rail carrier shall not apply" make the purpose of the bill manifest. That there was no intention to curb the Commission's general powers over joint rates is very plainly indicated by the statement that the Commission was being given *"additional authority."* Congress, in short, was giving the Commission power to short-haul a carrier in circumstances where it was not previously authorized to do so. No longer was the Commission's power to be restricted to the case where the existing route was unreasonably long. The Commission was also to be permitted to open a new route whenever such route was needed "to provide adequate, and more efficient and economic transportation." But Congress added a caveat. It said to the Commission in substance: "This does not mean that you are to open up a new route merely to confer a financial benefit upon a particular carrier which would profit from a diversion."[35]

[35] Witnesses for the trunk lines vigorously contended that diversions to intermediate short-line carriers would often be uneconomic from the public standpoint. See note 34, *supra*. The short lines and shippers' associations contended with equal vigor that if the short lines were permitted to participate more freely as intermediate carriers, the shipper would have more flexible service available. See, *e. g.*, Hearings on S. 1085, *supra*, pp. 30, 48–9; Hearings on H. R. 3400, *supra*, pp. 214–215. The bill, as finally adopted, bears the imprint of both viewpoints. The statute gives the Commission increased power to open up new routes, while requiring that it be guided by considerations of public economy.

Hitherto, Section 15 (4) has been deemed applicable only to cases involving short-hauling. See, *e. g., Pennsylvania R. Co.* v. *United States,* 323 U. S. 588, 590–3; *Interstate Commerce Commission* v. *Columbus & Greenville Ry. Co.,* 319 U. S. 551, 555; *United States* v. *Missouri-Pacific R. Co.,* 278 U. S. 269. Here, of course, there is no possible question of short-hauling; there is only one route. It is now suggested for the first time, however, that the prohibitory language in Section 15 (4) operates as a general limitation upon the Commission's power to establish joint rates. If that was the intention of Congress—and there is no suggestion in the voluminous legislative history that it was—it would have been only logical to include a similar limitation in Section 15 (3), which was concurrently amended. The fact that this was not done weighs conclusively against appellee's argument.

We submit that the Commission has general authority to establish through routes and joint rates applicable thereto. When the Commission's action is designed to open a new through route and to divert traffic from an existing route to that new route, admittedly there are limitations upon the Commission's power to take the step. But where the through route is already open and is, indeed, the only available route, the Commission has full authority to order a joint rate for the traffic, upon a finding that it is in the public interest to do so. And in prescribing a division of the joint rate so

established, the Commission is not merely authorized to consider the financial needs of the participating carriers; it is affirmatively directed to do so.[36]

II

THE COMMISSION'S ORDER HAS AN ENTIRELY RATIONAL BASIS IN THE RECORD

Having held that it was an error of law for the Commission to consider the financial needs of Montana Western, the district court went on to hold that the order was "not sustained by the evidence." It is plain from the opinion, however, that the latter conclusion was rested upon the court's view that all of the evidence going to financial needs had to be excluded from consid-

[36] In its Motion to Affirm (p. 22) Great Northern seeks to reconcile its construction of Section 15 (4) with the affirmative direction in Section 15 (6) that the Commission shall consider financial need in prescribing divisions. Faced with the necessity of allowing some play to the language in 15 (6), appellee concedes that if a joint rate on grain (as distinguished from a combination rate) had already been in effect between the Montana Western and the Great Northern, the Commission would have been authorized to order a reapportionment of the revenues. The Great Northern and the Montana Western, it may be noted, have established joint rates on numerous commodities, including cement, coal, lumber, petroleum products, livestock, and gypsum (Ex. 15). On appellee's theory the Commission is authorized to reapportion the share of revenue received by each carrier for the carriage of these commodities, taking the financial needs of each into account. But appellee would have it that the Commission cannot reach the same result where the shipment of grain is concerned, because, prior to the order, grain moved under combination rates. This argument has no more foundation in the statutory scheme than it does in common sense.

eration. If, as we believe (Point I, *supra*) and shall here assume, that evidence was properly considered by the Commission, there is no real question that the record furnishes a rational basis for the order.

The finding that the establishment of a joint rate on grain was in the public interest rests upon subsidiary findings that the existing combination rate was reasonable and that it should not be raised; that Montana Western needed additional revenues from the grain traffic "to insure safe and efficient operation" of its line; and that the continued operation of the Montana Western was a matter of public convenience and necessity. Great Northern has not taken issue with any of these subsidiary findings and it is clear, in any case, that they are amply supported by the evidence (see Statement, *supra*, pp. 14–18). It is equally plain that there is no matter more directly related to the public interest contemplated by the Interstate Commerce Act than the continuation of carrier service for which there is a public need.

So far as the division of the joint rate is concerned, the report of the Commission shows that the Commission considered all of the factors which it was required by Section 15 (6) to take into account. These are (1) the efficiency of the carriers; (2) their respective revenue needs; (3) the importance to the public of the transportation service involved; and (4) "whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or

circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

On the subject of efficiency, the Commission found that there was no indicated inefficiency in the combined operations of the two roads "except such as may have resulted from the inability of the Montana Western to obtain sufficient revenue" (R. 21). As previously stated, the Commission's order is designed to give Montana Western sufficient revenue to make such improvements as will "insure safe and efficient operation" in the future.

That the Commission considered the financial needs of Montana Western, Great Northern will not gainsay. It also considered the revenue needs of Great Northern, comparing the car-mile yield which Great Northern obtains on grain traffic generated by its own branch lines in adjacent areas with the yield obtained on grain traffic originated by Montana Western. It found that Great Northern's existing proportional rate on traffic originated by Montana Western is comparatively high, and that, under the division prescribed, Great Northern will obtain a car-mile yield on Montana Western origin traffic in substantial conformity with its earnings on the traffic generated by its own branches (R. 20–21, 23).[37]

[37] Great Northern contended below that the Commission erred in making reference to certain other rates not part of

The numerous considerations which led the Commission to conclude that there was an important public need for the continuation of the transportation service performed by Montana Western have been noted above, together with a summary of the pertinent evidence. Statement, *supra*, pp. 14–18. That this conclusion has adequate support in the record could scarcely be controverted.

The Commission also gave weight to the fact that Montana Western was an originating carrier with respect to all of the grain traffic involved and was by that token entitled to special consideration from the standpoint of revenue apportionment.[38] The Commission noted that on some of the grain originated by Montana Western, Great Northern serves merely as an intermediate carrier.[39]

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this record, namely, the appendix-10 scale of rates promulgated in the *Class Rate Investigation, 1939*, 262 I. C. C. 447, 766. The district court did not rest its decision upon this contention or even refer to it in its opinion. A reading of the Commission's report discloses that the Commission used the appendix-10 scale as a convenient formula for expressing the divisions which it determined to be appropriate, rather than as evidence justifying the particular division order. See note 19, *supra*.

[38] The Commission also took note of the fact that Great Northern provides the cars pursuant to certain leasing agreements (R. 19) and that it makes arrangements for "in transit" services (R. 17).

[39] As Section 15 (6) recognizes, joint rates could not reasonably be apportioned merely on a basis of mileage. As is well known, terminal and switching costs and the substantial ex-

It need scarcely be added that all of the above factors are of such nature that they "must be valued as well as weighed" and that the "essentially empiric process" of rate-making is within the special competence of the permanent expert body that Congress has created for the purpose. *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546. Since the Commission's action has a rational basis, the Court "will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling." *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547.

III

THE HOLDING OF THE DISTRICT COURT WOULD SHACKLE THE COMMISSION IN ITS PERFORMANCE OF THE DUTIES IMPOSED UPON IT BY CONGRESS

Since the adoption of the Transportation Act of 1920, the Commission has been charged by the Congress with the task of developing and main-

penses incident to origination of freight may be far more important from the cost standpoint than the distance that the freight is hauled. Note, for example, that the Great Northern's proportional rate on grain traffic moving from Conrad to Spokane (475 miles) is 56 cents, while its rate from Conrad to Seattle (788 miles), a trip 66 percent longer, is only 58.5 cents. Note, also, that the Great Northern's rate from Conrad to points in North Dakota is the same as its rate from Conrad to Sioux City, Iowa, which is more than twice as far as some of the North Dakota stations (see note 11, *supra*, and Ex. 38).

taining an adequate public system of transportation. Essential to the realization of that purpose is the Commission's power to prescribe joint rates for carriers participating in established through routes and to apportion revenues between such carriers. Since the Court's decision in the *New England Divisions Case*, decided in 1923, that power has been unquestioned.

The economic problems faced by Montana Western are of the same general character as those which have periodically afflicted hundreds of our railroads, particularly the short lines. The comments of Justice Brandeis, speaking for this Court in the *New England* case, might well have been written for the instant case. Referring to the Transportation Act of 1920 and to the problems it was designed to meet, he stated (261 U. S. at 190–1):

> To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. * * * The existence of the varying needs of the several lines and of their varying earning power was fully

> realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. * * * The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

The opinion further states (p. 194) that one of the purposes of the statute was to "protect the short lines, which, because of their weakness, might refrain from making complaint, for fear of giving offence * * *."

The earning power of many short lines is seriously limited by economic and geographic factors beyond their control. Frequently these lines serve agricultural and mining areas in which the movement of traffic is overwhelmingly one-way. The railroads are needed to carry out bulky produce grown or mined in the region. But the absence of substantial inbound traffic means that their earning power per mile of track is apt to be substantially less than that of trunk lines like the Great Northern.[40] While short lines of this character are often financially weak, this does not signify a lack of economic importance. In the aggregate, these lines form a vital part of the transportation network and of the nation's economy. The National Transportation Policy

[40] The Commission took note of this factor in its decision (R. 22).

(see note 29, *supra*) requires their maintenance and development. Congress has equipped the Commission with the powers which it needs to meet "the dynamic character of transportation problems." *Board of Trade of Kansas City* v. *United States, supra,* at 546. But if the interpretation of the statute adopted by the district court is permitted to stand, there will be serious inroads upon the exercise of those powers. In periods of economic contraction and declining rail revenues, the consequences may well prove calamitous for numerous common carriers.

CONCLUSION

The decree of the district court should be reversed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
H. GRAHAM MORISON,
Assistant Attorney General.
RALPH S. SPRITZER,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel.
EDWARD M. REIDY,
Associate Chief Counsel,
Interstate Commerce Commission.

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